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In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1903.

ARCHIE BURRELL,

Plaintiff in Error,

vs.

THE STATE OF MONTANA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

E. C. DAY,

Attorney for Plaintiff in Error.

20341

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THE STATE OF MONTANA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This cause comes into this Court on a writ of error sued out by the plaintiff in error, Archie Burrell, to review a judgment of conviction rendered by the Supreme Court of the State of Montana on the 22nd day of December, 1902.

STATEMENT OF THE CASE.

The plaintiff in error was informed against on the 24th day of September, 1901, in the District Court of the Eighth

Judicial District of the State of Montana, in and for the County of Cascade, of the crime of obtaining property by false pretences, in that as alleged, he the plaintiff in error did on the 20th day of March, A. D. 1901, knowingly, designedly, fraudulently, unlawfully, falsely and feloniously represent to the Royal Milling Company, a corporation, that a certain statement in writing which he had then and there produced, was a true and correct statement of the assets and liabilities of the defendant, whereas, as a matter of fact the said statement was false in that his liabilities aggregated more than Fourteen Thousand Dollars instead of Six thousand nine hundred fourteen and seventy-six-one hundredths Dollars, as stated in said statement, and that in reliance upon said statement the said Royal Milling Company was induced to sell and deliver to the said plaintiff in error, then defendant, certain goods, wares and merchandise (Record page 1).

A trial was had to a jury which resulted in a verdict of guilty as charged in the information, and the punishment fixed at one year in the State prison. Defendant moved in arrest of judgment, and also for a new trial (Record p. 6). The motion for a new trial came on to be heard on a bill of exceptions, and after argument and submission to the court, was by the court on the 27th day of November, 1901, denied (Record p. 43); and thereupon the defendant was sentenced to imprisonment for one year in the State prison (Record p. 43).

From the judgment of conviction and the order denying the motion for a new trial, the plaintiff in error, then defendant, appealed to the Supreme Court of the State of Montana (Record p. 44), assigning as error, among other things, the

action of the court in giving instruction No. 2, which said instruction was in words and figures as follows, to-wit (Record p. 38):

"The court instructs the jury that the fact that defendant testified in an insolvency proceeding in obedience to a citation did not deprive him of his right to refuse to answer questions tending to criminate him, if he did answer any such questions, and an admission made by him in such proceeding is voluntary and competent evidence in a criminal prosecution subsequently inaugurated, where he was not in custody, or charged with a criminal offense when he made such admission, if he did make any such," for the reason that said instruction invaded the province of the jury, in that it directed their attention to the alleged admissions of the defendant and was a charge upon the effect and weight of the evidence. The defendant excepted to the instruction for the further reason that the same did not correctly state the law, in this, that it appeared from the testimony that the defendant had testified upon an examination before a referee in bankruptcy, held pursuant to the provisions of the Act of Congress, approved July 1st, 1898, which said act provided as follows: Chapter III, Section 7 etc. "But no testimony given by him (upon his examination) shall be offered in evidence against him in any criminal proceeding."

The cause was submitted to the Supreme Court of the State of Montana on the 10th day of November, 1902, and on the 22nd day of November, 1902, the said Supreme Court entered its judgment affirming the said judgment appealed from, and accompanied the same by its written opinion (Record pp. 46-48), wherein it held that the said Bankruptcy Act

did not grant the bankrupt immunity from prosecution because of anything testified to by him in the bankruptcy proceeding, and that the defendant had waived his constitutional privilege by failing to object to the cross examination had in the district court with reference to the testimony which he had given before the referee in bankruptcy, and that the said instruction complained of was not erroneous. Whereupon the defendant sued out this writ of error, assigning error as follows (Record page 50.)

ASSIGNMENT OF ERRORS.

1. The court erred in holding that the Act of Congress to establish a uniform system of bankruptcy, approved July 1st, 1898, does not grant to a bankrupt immunity from prosecution because of facts testified to by him before the referee in bankruptcy proceedings.

2. The court erred in holding that the fact that the said defendant testified in such proceedings before the referee in bankruptcy did not deprive him of his right to refuse to answer questions tending to criminate him, and that admissions made by him in such proceedings were voluntary and competent evidence in a criminal prosecution subsequently inaugurated for crimes growing out of the circumstances testified to by him before said referee.

ARGUMENT.

It is apparent from the foregoing statement of the case and the record that the plaintiff in error asserted in the Supreme Court of the State of Montana a privilege or immunity arising under the constitution of the United States and under the statutes of the United States relative to bankruptcy,

and the decision of this court was against the existence of such privilege or immunity specially set up and claimed, and therefore this court has jurisdiction of this cause. The only question in the case then is, did the Supreme Court of the State of Montana err in so holding that the fact that the plaintiff in error had been examined before a referee in bankruptcy did not give to him immunity from prosecution in the State court for any crime growing out of the circumstances about which he was examined. It will be noted that the defendant submitted to the cross-examination in the State court relative to his testimony before the referee in bankruptcy without objection (Record p. 22-31), and error was not assigned in the Supreme Court upon the cross-examination. It was assigned with reference to the giving of the instruction to the effect that the examination before the referee in bankruptcy amounted to a voluntary admission which was competent evidence in a criminal prosecution against the bankrupt.

Prior to the examination of this bankrupt and the institution of these criminal proceedings the Circuit Court of Appeals for the Ninth Circuit of the United States, sitting at San Francisco, on the 14th day of May, 1900, had decided in the case of *Mackel vs. Rochester, 102 Fed., 314, 42 C. C. A., 427*, that a bankrupt could not refuse to answer questions relating to his transactions on the ground that his answers would tend to incriminate him, for the reason that his constitutional privilege against his self-incriminating evidence was protected by the bankruptcy act of 1898, Chapter 3, Section 7, Subdivision 9, which provided that "no testimony given by him shall be offered in evidence against him in any criminal proceeding."

In its opinion the court says: "The bankruptcy act contemplates the equitable distribution of the estate of the bankrupt among his creditors, and that the bankrupt will honestly produce and transfer to the trustee all property belonging to him. The testimony which he may be compelled to give includes any matter within his knowledge which is relevant to the prosecution under investigation and material to its determination. If in giving such testimony he exposes himself to prosecution and penalty, he is within the protection of the statute, and upon any such prosecution is authorized to plead as a bar thereof that under the compulsion of this section he gave the criminating testimony." And in support of this decision the court cites and follows the case of *Brown vs. Walker, 161 U. S., 591.*

The case of *Mackel vs. Rochester* has never been reversed or overruled and stands as the law of the courts of the United States for the Ninth Circuit, with reference to such examinations, in which circuit was situated the State of Montana wherein the alleged crime was committed and the prosecution had. So that at the time of the examination of the bankrupt, and at the time of the trial of this criminal prosecution, it was the law of the circuit that the bankrupt could not decline to answer questions put to him upon his examination upon the ground that his answers might tend to incriminate him, and his submission to the examination was to that extent not voluntary.

The ultimate jurisdiction over questions involving the constitutionality of the United States bankrupt laws rests in the courts of the United States, and such courts having pro-

nounced said law to be constitutional, a defendant who brings himself within its provisions will have a complete defense.

Keene vs. Mould, 16 Ohio, 12.

The decision of the Supreme Court of the United States upon the constitutionality of the legal tender act is of paramount authority, and State courts are bound by whatever construction that court places upon the law.

Black vs. Lusk, 69 Ill., 70.
Barringer vs. Fisher, 45 Miss., 200.
Kellogg vs. Page, 44 Vt., 356.

It is a rule too well settled to require the citation of many authorities to support it that the state court is bound to follow the decisions of the Supreme Court of the United States as to whether an act of Congress is constitutional or not. In addition to the authorities cited above, reference may be made to

Hicks vs. Hotchkiss, 7 Johns Ch., 297.
Burwell vs. Burgess, 32 Grat., 472.
Ex Parte Bushnell, 9 Ohio St., 77.
Mooney vs. Hinds, 160 Mass., 469.
State vs. Sioux City, O. & W. R. Co., 46 Neb., 682.

The decision of the Circuit Court of Appeals, until it was reversed or overruled, was entitled to the same credit and force and effect in the courts in the State of Montana as the decision of the Supreme Court of the United States. Consequently when it appeared in the State court that the defendant, now plaintiff in error, had been examined before the referee in bankruptcy touching the matters out of which grew the transaction complained against in the criminal proceeding,

it was the duty of the state court to have dismissed the proceeding. The trial court and the Supreme Court of the state seem to have proceeded upon the theory that the defendant by failing to object to the use on cross-examination of the testimony taken before the referee thereby waived his constitutional privilege and the immunity given him by the bankrupt act, and that admissions made by him before the referee in bankruptcy stood upon the same plane as admissions made out of court (See opinion, Record p. 49.) But the immunity given by the bankruptcy act, if any, goes further than a mere immunity against the admission in evidence of the testimony given before the referee in bankruptcy. It goes, and must go, if it is to secure to him his constitutional privilege, to the extent of protecting him from prosecution for any crime growing out of the transaction about which he has been examined.

Brown vs. Walker, 161 U. S., 591.
Mackel vs. Rochester, 102 Fed., 314.

This then was a jurisdictional question touching the right of the state court to prosecute him for offenses growing out of these transactions, and being jurisdictional in its character could be raised at any time, even after conviction and sentence. It was contended by counsel for the state that the immunity granted by the act extended only to prosecutions by the Federal government. That question, however, has been decided by this court in the case of *Brown vs. Walker*, *supra*, in which it was held that Federal statutes made in pursuance of the constitution and laws of the United States, are the supreme law of the land, and that the immunity granted by the acts of Congress must extend to any transaction, matter or thing

20345

concerning which the witness may testify, and must be applicable whenever and in whatever court the prosecution may be had. The constitutionality of the bankruptcy act was not an open question in the state courts, and it was the duty of the state court to grant to such bankrupt the full privilege and immunity to which the Federal courts had held him to be entitled. Having failed to so grant such immunity, we submit that the Supreme Court of the State of Montana was in error and that the judgment should be reversed and the cause remanded.

Respectfully submitted,

E. C. DAY,

Attorney for Plaintiff in Error.